IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM WARDEN DUNCAN, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	No. 21,709

APPELLEE'S BRIEF

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES

STATUTES

FEDERAL RULES OF CRIMINAL PROCEDURE

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JURISDICTIONAL STATEMENT

On April 27, 1966, the Grand Jury for the District of Arizona, at Phoenix, indicted appellant, William Warden Duncan, and Judson Wesley Rainey, alleging in two counts that the defendants had violated Title 18, United States Code, Section 2313, Receiving and concealing Stolen Motor Vehicles Moving in Inter-State Commerce. On July 5, 1966, the appellant was present with counsel for his arraignment in the United States District Court for the District of Arizona, at Phoenix, and entered pleas of not guilty to both counts of the indictment, No. C-17477-Phx. The co-defendant, Judson Wesley Rainey was arraigned at the same time and also entered pleas of not guilty to both counts of the indictment.

On December 13, 1966, the date set for trial, appellant filed a Motion for Separate Trial which was joined in by the co-defendant, Judson Wesley Rainey. The Court granted appellant's motion and the case proceeded to trial as to him only.

On December 14, 1966, the jury returned a verdict of guilty as to both counts of the indictment. On January 9, 1967, the Court sentenced the appellant to a term of five years imprisonment under the provisions of Title 18, United States Code, Section 4208(a)(2) on each count and a fine of one thousand dollars, both sentences to run concurrently. Thereafter on February 20, 1967, the co-defendant, Judson Wesley Rainey entered a plea of guilty to Count I of the indictment, imposition of sentence was suspended and he was placed on probation for three years.

Appellant William Warden Duncan brings this appeal from the judgment and sentence of the trial Court. The jurisdiction of the Court on this direct appeal is created by Title 28, United States Code, Section 1291, and the timely filing of the Notice of Appeal. Appellant has been at liberty on bond pending the outcome of this appeal.

STATEMENT OF FACTS

Appellant was charged by indictment with violations of Title 18, United States Code, Section 2313. That section reads as follows:

> "Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

The indictment was substantially in accord with Form 7, Federal Rules of Criminal Procedure, with the exception that it contained allegations of a more specific nature than those contained in the form. Count I of the indictment was in the following language:

> "On or about the 11th day of September, 1965, WILLIAM WARDEN DUNCAN and JUDSON WESLEY RAINEY, in the State and District of Arizona, did receive and conceal a stolen motor vehicle, to-wit: a 1961 Chevrolet Impala which was moving as interstate commerce from Los Angeles, State of California, to Phoenix, State of Arizona, and they then knew the motor vehicle to have been stolen."

Count II was in the same form with the exception that there were differences as to date, description of the vehicle, and place of origination of the transportation. That offense allegedly occurred on the 18th day of October, 1965, the vehicle was a 1964 Chevrolet Impala Supersport, and the car was alleged to have been moving from Huntington Park, State of California.

On October 6, 1966, appellant filed his Motion for Bill of Particulars, a copy of which is set forth as an Appendix to his brief. The motion was argued on November 14, 1966 before the same Court that presided over the trial of this case and was denied. Leave was given, however, to renew the motion at a pre-trial conference to be held pursuant to Rule 17.1, Federal Rules of Criminal Procedure.

The pre-trial conference was held on December 8, 1966. Present were the trial judge, counsel for the appellant, counsel for the appellee, counsel for the co-defendant, and a court reporter. (Please note that the transcript of proceedings of the pre-trial conference is mistakenly numbered C-17636-Phx., and should read C-17477-Phx.). A further hearing was also held on the appellant's Motion for Bill of Particulars. At that time appellee advised the court that it had supplied some of the information requested by appellant in his motion and agreed to formally make that a part of the record by filing a Bill of Particulars with the Court (Pre-Trial Tr. p. 2). A copy of that Bill of Particulars is included as an Appendix to this brief. In its initial response to appellant's motion, appellee also had stated that the government had no knowledge of any evidence favorable to the defendant believed to be material to the ultimate issue of guilt or innocence. As to all other matters requested in the appellant's motion, the

motion was denied (Pre-Trial Tr. p. 2). No agreement was reached concerning a voluntary exchange of information between the appellant and the appellee.

On December 13, 1966, immediately preceding the trial, appellant filed a Motion for Separate Trials. Prior to that motion being argued, appellee advised appellant's counsel in answer to an additional item sought in the Motion for Bill of Particulars that another individual had been charged with possession of the vehicle described in Count II of the indictment. Counsel for the appellant indicated he already knew this. Appellee further advised counsel that no one had been charged with possession of the vehicle described in Count I of the indictment other than appellant and his co-defendant. (Tr. p. 114). The appellant's Motion for Separate Trials was granted and the case proceeded to trial against the appellant, William Warden Duncan, only. (Tr. p. 4).

A representative of Bell Auto Sales, Inc., 2909 South Figueroa, Los Angeles, California, testified that the company was the owner of a 1961 Chevrolet on or about September 9th through 11th, 1965. (Tr. p. 19). The car was a white Impala coupe and sometime during the above period of time the car was stolen from the company lot in Los Angeles (Tr. p. 20). The license number of the vehicle was California License No. JGF 146 and the plates were on the car at the time of the theft (Tr. p. 20).

Plaintiff's Exhibit 1, the Certificate of Ownership kept by the company, was admitted into evidence (Tr. p. 19). It shows that the vehicle identification number is 11837L110169. The keys were not taken when the car was stolen (Tr. p. 21).

The secretary-treasurer of John Schleifer, Inc., Huntington Park, California, another car dealer, testified that the corporation owned a 1964 Chevrolet on or about October 15th through 18th, 1965 (Tr. p. 22). He identified plaintiff's Exhibit 2 as the company record reflecting ownership of this vehicle and the inventory card was admitted into evidence (Tr. p. 25). On October 15, 1965, the car was on the company lot at 5920 Pacific Boulevard, Huntington Park, California (Tr. p. 26). The car was discovered missing on approximately October 16, 1965, and no permission had been given anyone to remove the vehicle (Tr. p. 26). It was described as a two-door, white, Supersport coupe (Tr. p. 27). Exhibit 2 reveals that the vehicle identification number of the car was 41447L131153.

The evidence showed that an individual named Robert Menz stole the two automobiles referred to in Counts I and II of the indictment. Mr. Menz testified that he had conversations with the appellant during the early part of September, 1965, one of which took place at the appellant's house in Phoenix (Tr. p. 30). The conversations involved the possible disposition of

stolen automobiles, and during one of these conversations the appellant said that he knew of someone who could handle such matters (Tr. p. 30).

On September 10, 1965, Menz telephoned from Los Angeles, California, and spoke with appellant at his home in Phoenix (Tr. p. 31). Menz asked the appellant if he could use an automobile and the response was in the affirmative. The appellant specifically stated that he could use a 1961 Chevrolet. During the conversation it was mentioned that Menz would steal such a car (Tr. p. 32). On that same evening Menz located a 1961 Chevrolet on a car lot in the 2200 block on South Figueroa, Los Angeles, California. Later that night he returned to the lot and stole the car (Tr. p. 33). He was able to drive that car despite the fact that he had stolen the wrong key due to the fact that the switch had been turned merely to the "Off" position instead of to the "Lock" position (Tr. p. 33-34).

Menz arrived in Phoenix the following morning, telephoned the appellant and was instructed to deliver the car to Shorty Brown's Club Lido on East McDowell Road in Phoenix (Tr. p. 35). At the Club Lido he met the appellant and Mr. Rainey. The appellant asked where the car was and Menz informed him that it was in the parking lot behind the Club Lido. The appellant and Rainey went out to look at the car, came back in stating that it was all right and told Menz to take the car down

to the Doll House on 32nd Street and McDowell. He was further instructed to take the license plates off and park the car in the rear (Tr. pp. 35-36). Menz met the appellant at the Doll House at which time the appellant handed him approximately $200.00 wrapped in a napkin (Tr. p. 36). He identified Government's Exhibit 3 as a picture of an automobile of the same make and model as the one he drove from Los Angeles (Tr. p. 37).

Menz then left Phoenix and returned to California. On Approximately October 15, 1965, he again called the appellant and asked whether the appellant could use any more cars. The appellant stated that he could use a 1964 Chevrolet (Tr. p. 37). Menz found such a vehicle on the lot of John Schleifer Motors in Huntington Park, California, stole it, and drove it to Phoenix, Arizona, on approximately that same date (Tr. p. 38). After some telephone conversations with the appellant, Menz delivered the car to Shorty Brown's Club Lido that following Monday (Tr. p. 41). Prior to that on Sunday, Menz had driven the car to the appellant's house where appellant removed the spare tire and brought it in the house (Tr. p. 41). On Monday when the car was delivered to the Club Lido both the appellant and Rainey were present and went outside to inspect the car (Tr. p. 42). Menz was instructed to drive the car to the Doll House as he had done with the 1961 Chevrolet and take the license plates off (Tr. p. 42). He drove the car to the Doll House but did not remove the plates. At the Doll House he met the appellant and

Rainey at which time the appellant handed him approximately $170.00 (Tr. p. 43). He identified Government's Exhibit 4 as a picture of a vehicle of the same type and body style that he stole on October 15, 1965 (Tr. p. 45).

The appellant and Menz had a telephone conversation on approximately December 10, 1965, after Menz had returned to California. As a result of that conversation Menz came to Phoenix and went to the appellant's house in Phoenix. The appellant told him that a Mr. Hurst had been arrested in connection with the cars, that the F.B.I. had picked up both vehicles but that there was nothing for Menz to worry about because there was no connection between Hurst and Menz (Tr. pp. 47-48). On cross-examination Menz stated that he had been convicted of three felony charges and that he had not been charged in connection with the two stolen vehicles referred to in the indictment against the appellant (Tr. pp. 48-49).

In the early fall of 1965, Beverly Harrell was renting a room at the appellant's residence in Phoenix. She testified that she saw a white Chevrolet, approximately a 1961 model, at the appellant's house (Tr. p. 63). On one occasion when she needed a car to drive the appellant suggested that she drive this vehicle (Tr. p. 64). She further testified that she was not given a key for this car but was able to start it by turning the ignition knob (Tr. p. 65). Appellant moved to strike this testimony as being unconnected with the issues in the case,

which motion was denied (Tr. p. 65).

An employee of the Arizona State Highway Department testified that she had supervision of the records of the motor vehicle bureau. She stated in response to a question concerning a search of those records that she had found no registration for a 1961 or 1964 Chevrolet in the appellant's name for the year 1965, nor did she find a registration for any Chevrolet in his name for that year (Tr. p. 69).

Vernon Hurst was engaged in the business of automobile body repairing and painting during October, 1965, at his residence in Phoenix, Arizona. He testified that he had left Phoenix on a trip during that month and when he returned on October 22nd he noticed two vehicles on his property that had not been there when he left. One was a 1961 Chevrolet two-door hardtop; the other was a 1964 Chevrolet two-door hardtop (Tr. p. 72). He identified Government's Exhibits 3 and 4 as being pictures of the same type of vehicles that were at his house (Tr. pp. 72-73). On December 7, 1965, he drove the 1964 Chevrolet off his property and was arrested for possession of stolen property (Tr. p. 73). The license plate that was on the 1964 Chevrolet came from the Rainey Brothers Used Car Lot (Tr. p. 76). Originally both cars had dealer plates on them but Bob Rainey had taken one of them back (Tr. p. 77).

Hurst further testified that there was a key for the 1964 Chevrolet but none for the 1961 model. However, due to the fact that the ignition in the 1961 car was left in the "On" position it was possible to drive it without a key (Tr. p. 78).

During 1965 Yvonne Hurst was Vernon Hurst's wife. She testified that on approximately October 21, 1965, Judson Wesley Rainey drove up to her house in a light-colored Chevrolet, while her husband was away on a trip (Tr. p. 84). He left and returned with another light-colored Chevrolet (Tr. p. 85). She identified Government's Exhibits 3 and 4 and reflecting the same type of cars that Rainey had driven to her house (Tr. p. 85). Rainey drove the cars onto the back lot, an area beyond the house and parked them behind a lot of shrubbery (Tr. p. 86). The cars were still at that location on November 5th when she moved out of the house (Tr. p. 86). On cross-examination she stated that she recognized the appellant but never had any conversations with him about the automobiles nor had she seen him near the cars (Tr. pp. 87-88). She had seen appellant at her house several months prior to the theft of the vehicles (Tr. p. 89).

The remaining testimony consisted of the events surrounding the arrest of Vernon Hurst in the 1964 Chevrolet and the examination made of the vehicles by a police officer and a special agent of the F.B.I. The 1961

Chevrolet was on the property of Vernon Hurst on the date of his arrest. Examination of the serial numbers on both vehicles revealed that they were respectively identical with the numbers of the cars stolen in California by Robert Menz. Government's Exhibits 3 and 4 were identified by the F.B.I. agent as being photographs of the cars he examined on December 8, 1965 (Tr. p. 98). The dealer plates found on the 1964 Chevrolet had been issued to Rainey Brothers (Tr. p. 99).

At the close of the Government's case the appellant again moved to strike the testimony of Beverly Harrell on the grounds that the testimony was immaterial and not relevant to the issues in the case, which motion was again denied (Tr. p. 109). The defense rested without offering any evidence (Tr. p. 111).

After final arguments and instructions the case was submitted to the jury. The defendant was found guilty of both counts charged in the indictment (Tr. p. 160).

SUMMARY OF ARGUMENT

RESPONSE TO SPECIFICATION OF ERROR NO. 1

The District Court did not err in refusing to grant appellant's Motion for a Bill of Particulars. (Tr. p. 2). The allegations of the indictment together with the information voluntarily furnished by the appellee in its Bill of Particulars were sufficient to adequately advise appellant of the nature and cause of the accusation against him. The Court did not abuse its discretion in denying appellant's motion.

RESPONSE TO SPECIFICATION OF ERROR NO. 2

The District Court properly denied appellant's motion to strike the testimony of Beverly Harrell (Tr. p. 65, 109). The testimony was relevant and material on the issues of receiving and concealing the vehicle described in Count I of the indictment. Any inconsistency or vagueness in the testimony was a matter of weight rather than admissibility and such testimony was properly submitted to the jury.

ARGUMENT

1. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S MOTION FOR A BILL OF PARTICULARS

An application for a bill of particulars is addressed to the sound discretion of the trial court. Cook v. United States, 354 F.2d 529 (9th Cir. 1965); Remmer v.

United States, 205 F.2d 277 (9th Cir., 1953). Under the facts of this case the trial court properly denied the motion for a bill of particulars.

The appellant filed a motion for a bill of particulars seeking responses to some twenty-two items. This motion related not to a complex charge involving broad issues but to relatively simple allegations of receipt and concealment of two specific motor vehicles, which were moving in interstate commerce, with the knowledge that they had been stolen.

The purpose of a bill of particulars is to protect a defendant against a second prosecution for an inadequately described offense, and to enable him to prepare an adequate defense. Cook v. United States, supra. The indictment charged the offenses in language that was somewhat more specific than that contained in Form 7, Federal Rules of Criminal Procedure. The indictment and the bill of particulars combined informed the appellant of the following with reference to the charges brought against him in each count:

1. The approximate date of the alleged offenses (on or about the 11th day of September, 1965; on or about the 18th day of October, 1965).
2. The name of the person jointly charged with him (Judson Wesley Rainey).

3. The city within the District of Arizona where the vehicles were allegedly received and concealed (Phoenix).

4. A description of the stolen vehicles which were allegedly received and concealed together with the name and address of the owners (a 1961 Chevrolet Impala, white in color, serial number 11837L110169, owned by Bell Auto Sales, 2909 South Figueroa, Los Angeles, California; a 1964 Chevrolet Impala Supersport, white in color, serial number 41447L131153, owned by John Schleifer, Inc., 5920 Pacific Boulevard, Huntington Park, California).

5. The places from which the vehicles originated as interstate commerce and the place to which they were driven (Los Angeles, California to Phoenix, Arizona; Huntington Park, California to Phoenix, Arizona).

The items requested in the motion for a bill of particulars were purely evidentiary in nature. An example of this is apparent in Items 3, 4, 5, 6, 13, 14, 15 and 16, wherein appellant sought to determine whether the government would contend that either he or

his co-defendant drove the vehicles in question, and if so, the places from which and to which the cars were driven. The appellant was not charged with transporting the vehicles but with receiving and concealing them.

The appellant urges that he should have been supplied with the exact date of the alleged receipt and concealment of the vehicles. Yet in his motion for a bill of particulars he did not ask for a more specific date or time, although that matter was orally raised at the pre-trial conference. Furthermore, even had he asked for this information in his written motion it could not have been supplied due to the continuing nature of the offenses charged.

The appellant further argues that he should have been supplied with the specific location where the cars were allegedly concealed and the name of the person from whom the vehicles were received. In support of this he cites a case in another circuit where the name of the buyer of narcotics was required to be revealed prior to trial together with the specific location where the sales occurred.

The merit of each request for this type of information should be decided on a case by case basis. The trial court's action on a bill of particulars is discretionary and should not be distrubed in the absence of an abuse of that discretion. Medrano v. United States,

285 F.2d 23 (9th Cir.,1960).

Very often in cases involving the sale of narcotics the issue of entrapment is raised. It may therefore become most important to know the name of the buyer and specific facts surrounding the transaction. Even in these instances the matter is discretionary with the trial court. In the case now before the court there is not the slightest hint of an issue of entrapment.

It is difficult to see how the possible defense of alibi was thwarted by a denial of the motion. Alibi depends on an individual being at a different place at the time of the offense. Once the evidence showed the place or places where the offenses occurred, appellant could have introduced testimony to show that he was at another place at that time. This he failed to do but that failure can in no way be attributable to the denial of the motion for a bill of particulars.

The appellee objected to supplying certain items in appellant's motion on the grounds that to so specify might tend to restrict the scope of the evidence at the trial (Tr. p. 5). The evidence at the trial revealed that the cars were kept at different locations in Phoenix for varying periods of time. The government should not be required to select a specific location and include that in a bill of particulars prior to trial, when the evidence is of such a nature.

As to the individual from whom the vehicles were received, he testified at the trial and was vigorously cross-examined. The appellee objected to revealing his name prior to trial for fear of possible physical danger to him. The witness, Robert Menz, was confined on another charge. This court can take notice as a matter of common knowledge that individuals who are confined in penal institutions and who are called to testify by the government are often in danger of being physically harmed. Under the circumstances of this case revealing Menz's name would have also revealed that he would be a witness at the trial.

There was no prejudice to the appellant in the denial of the motion for a bill of particulars. He was able to attack the credibility of the witness Menz by the use of prior felony convictions and in other ways. At the pre-trial conference counsel for appellant had indicated to the court that he reserved a right to request a continuance after the government presented its case for the purpose of presenting a defense to matters revealed at the trial (Pre-trial tr. p. 4). The court did not in any way indicate that it would not grant such a request. At no time, however, was such a request made.

One basis for the motion for a bill of particulars was that without it appellant would be limited in his opportunity to present a motion to sever (Pre-trial tr. p. 3). However, such a motion was made on the day of trial and was granted by the Court. (Tr. p. 4).

From the record before and at the trial it does not appear that appellant was prejudiced by the denial of the motion for a bill of particulars. He was adequately informed of the nature of the charges against him so as to allow him to prepare a defense. The Court did not abuse its discretion. Roberson v. United States, 249 F.2d 737 (5th Cir.,1957); Churico v. United States, 287 F.2d 666 (5th Cir.,1961).

2. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO STRIKE TESTIMONY OF THE WITNESS BEVERLY HARRELL

Beverly Harrell testified that she had rented a room from the appellant at his home in Phoenix and that during the early fall of 1965 she saw a white Chevrolet of the approximately model year 1961 at that home (Tr. p. 63). There was no key available for the car but she was able to start the engine without one. She was permitted to drive the car by the appellant.

Other testimony revealed that there were no Chevrolet automobiles registered to appellant in Arizona during the year 1965 (Tr. pp. 69-70). The testimony of Robert Menz, the individual who stole the 1961 Chevrolet and delivered it to appellant and the co-defendant Rainey was to the effect that due to the position of the ignition he could drive the car although he did not have the right key (Tr. pp. 33-34). Vernon Hurst, to whose house the 1961 Chevrolet was eventually delivered, testified that

there was no key for the car but due to the position of the ignition it could be started without a key (Tr. p. 78).

The evidence was relevant and material to the issue of receipt and concealment of the 1961 Chevrolet described in Count I of the indictment. Any doubts which might have arisen from uncertainty or contradiction in the testimony were for the jury alone and they were not a ground for withdrawing the testimony from the jury's consideration. United States v. Greenstein, 153 F.2d 551 (2nd Cir., 1946).

Mrs. Harrell described the car by approximate model year and color. She was staying at appellant's house during the period following the receipt of the car at Phoenix. The circumstances of a car of similar description being driven by Beverly Harrell, Robert Menz and Vernon Hurst, taken together with the time period and the fact that appellant had no similar car registered in his name, was sufficient basis to allow Mrs. Harrell's testimony to stand. The question was one of weight to be attached to the testimony rather than the admissibility of it. This was a jury function and the Court properly instructed the jury in this regard (Tr. p. 147). The denial of the motion to strike was not error.

CONCLUSION

The Court did not abuse its discretion in denying the appellant's motion for a bill of particulars, nor did it commit error in refusing to strike the testimony of a witness. The judgment and sentence of the District Court should be affirmed.

Respectfully submitted,

EDWARD E. DAVIS
United States Attorney

Morton Sitver

MORTON SITVER
Assistant U. S. Attorney

Copies of the foregoing
Appellee's Brief mailed this
6th day of September, 1967,
to:

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CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with these rules.

MORTON SITVER
Assistant U. S. Attorney

APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM WARDEN DUNCAN and JUDSON WESLEY RAINEY, Defendants.	NO. C-17477-PHX. BILL OF PARTICULARS

COMES NOW the plaintiff, United States of America, by and through its attorneys undersigned and formally gives notice of the following particulars previously furnished to the defendant, WILLIAM WARDEN DUNCAN, through his attorney, Robert A. Jensen, on November 30, 1966, and to the defendant JUDSON WESLEY RAINEY, through his attorney, J. William Moore, on December 5, 1966:

1. The 1961 Chevrolet Impala and the 1964 Chevrolet Impala Supersport described in the indictment were received and concealed at Phoenix, Arizona.

2. The serial number of the 1961 Chevrolet Impala is 11837L110169. At the time of the theft it was owned by and in the possession of Bell Auto Sales, 2909 South Figueroa, Los Angeles, California. The color of the vehicle is white.

3. The serial number of the 1964 Chevrolet Impala Supersport is 41447L131153. At the time of the theft it was owned by and in the possession of John Schleifer Incorporated, 5920 Pacific Boulevard, Huntington Park,

California. The color of the vehicle is white.

Respectfully submitted,

RICHARD C. GORMLEY
United States Attorney

/s/ Morton Sitver
MORTON SITVER
Assistant U. S. Attorney

Copy of the foregoing mailed this
12th day of December, 1966, to:

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/s/ Morton Sitver
MORTON SITVER
Assistant United States Attorney

STATE OF ARIZONA)
) ss. CERTIFICATE OF MAILING
COUNTY OF MARICOPA)

MORTON SITVER, being first duly sworn, upon his oath deposes and says:

That the foregoing Appellee's Brief has this 6th day of September, 1967, been mailed to attorneys for appellants, John J. Flynn and Robert A. Jensen in the law firm of Lewis Roca Beauchamp & Linton, 114 West Adams Street, Phoenix, Arizona, 85003.

DATED: September 6, 1967.

MORTON SITVER
Assistant U. S. Attorney

Subscribed and sworn to before me this 6th day of September, 1967.

Notary Public

My commission expires September 4, 1969.